IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-972

HERBERT MILDNER,

Appellant,

against

FRANK A. GULOTTA, individually and as Presiding Justice, Appellate Division of the State of New York, Second Judicial Department, HENRY J. LATHAM, J. IRWIN SHAPIRO, ARTHUR D. BRENNAN, FRED J. MUNDER, MARCUS G. CHRIST, JAMES D. HOPKINS, A. DAVID BENJAMIN, M. HENRY MARTUSCELLO, JOHN P. COHALAN, JR., individually and as Associates Justices of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and IRVING N. SELKIN, individually and as Clerk of the Court of the State of New York, Second Department,

Appellees.

No. 75-856

MILTON LEVIN,

Appellant,

against

FRANK A. GULOTTA, et al.,

Appellees.

No. 75-1111

JULIUS GERZOF,

Appellant,

against

FRANK A. GULOTTA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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The defendants-appellees move to dismiss the appeal from the order of a three-judge Court directing the entry of judgment dismissing the complaints in these actions upon the ground that the order directing judgment was entered upon an *abstention* basis, *not on the merits.*

The *order* of the statutory court and the prevailing opinion, written by District Judge Neaher (although it discussed the merits and reached a conclusion thereon adverse to the plaintiff-appellant) were firmly placed upon the ground that the federal court should *abstain* from passing upon the merits (3a-33a).* Circuit Judge Moore indicated that, in the interest of "conservation of judicial effort", he would have disposed of the case on the merits and would have sustained, as constitutional, the New York statutes challenged (Judiciary Law, § 90; New York Constitution, Art. 6, § 3a; and CPLR, § 5501b and 5601) in order to avoid this Court's "admonitions" in *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 95 S. Ct. 1278 (1975), against the non-appealability of three-judge District Court orders not "resting on a resolution of the constitutional merits of a complaint" (34a, 35a, 37a). Only District Judge Weinstein reached the conclusion that New York's provisions for lawyer-disciplinary proceedings were unconstitutional (38a-121a).

The Opinions Below

References in the plaintiffs' briefs to the District Court opinions are correct. The opinions have not yet been reported.

Jurisdiction

Each of the plaintiffs invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1253. But each goes to great length

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* Unless otherwise stated, references are to the appendix in the *Mildner* case (75-972).

to skirt this Court's ruling in *MTM, Inc.* v. *Baxley,* 420 U.S. 799 (1975), that it will not entertain an appeal from a three-judge court order which is *not* predicated upon a disposition of "the merits of the constitutional claim presented below" (420 U.S., at p. 804).

Statutes Involved

References in the plaintiffs' briefs to the statutes involved are correct.

Question Presented

The sole question presented upon this motion to dismiss or affirm is whether this Court has jurisdiction to entertain this appeal since the order below was not predicated upon the merits of the constitutional claim presented by the plaintiffs.

Statement of the Case

For the purposes of the disposition of this motion, we shall not encumber these papers with any detailed analysis of the different factual situations presented by the three jurisdictional statements here involved, but shall reserve such separate analysis for our brief in the event, which we deem unlikely, that this Court determines to note jurisdiction. We call the Court's attention solely to the fact that in the *Gerzof* case, the Appellate Division confirmed its referee's report, whereas in the other cases, it did not do so (Gerzof Jur. Statement, p. 6).

ARGUMENT

Since the statutory court did not predicate its order upon a disposition of the merits of the plaintiffs' constitutional claims, this Court should dismiss this appeal or affirm the order appealed from, pursuant to its decision in *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975). Moreover, no substantial federal question has been presented.

(1)

It clearly appears from each of the jurisdictional statements that the majority opinion of the three-judge court was predicated upon the principle of abstention and avoidance of a final disposition of the merits of the plaintiffs' constitutional claims. No matter how anxious Circuit Judge Moore appears to have been to reject the plaintiffs' constitutional claims, he signed the order and joined in the majority opinion enunciated by Judge Neaher which was based upon an avoidance of the merits.

We urge, therefore, that this appeal be rejected in accordance with this Court's decision in *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975). See also *Mendez* v. *Heller*, 420 U.S. 916 (Feb. 18, 1975), where this Court remanded an appeal to the District Court which had made a clear disposition on constitutional merits, but had determined that no case or controversy had been presented. No such remand is necessary here to enable the parties to appeal to the Court of Appeals for the Second Circuit, for they have all already taken such appeals. Indeed, in the *Levin* case, the Attorney General has already been served with an order of the Second Circuit, dated and filed January 30, 1976, directing the filing of Levin's record on or before March 15, 1976; his brief and joint appendix on or before April 26, 1976; and the appellees' brief on or before May 26, 1976. The Second Circuit order has required the appellant, Levin, to notify it of this Court's action with respect to the appeal

he filed in this Court; has ordered that argument of the appeal be ready to be heard during the week of June 7, 1976; and also subjects the *appellees* "to such sanctions as the court may deem appropriate" if we fail to file a brief within the time directed by the Second Circuit's order.

We should assume that the terms of the Second Circuit's order were predicated upon an assumption that this Court would not note jurisdiction; and a further awareness that the stays granted by the District Court to each of these appellants have served effectively to delay the implementation of the state court orders suspending each of these appellants from continuing to practice law. We note, too, that *each* of these appellants has filed a protective appeal to the Second Circuit. We can not conclude this section of our motion without calling to this Court's atention the criticism being leveled at the legal profession for the *delays* which already exist in processing of disciplinary proceedings affecting New York lawyers. See the report of the *ad hoc* Committee on Grievance Procedures of the Association of the Bar of the City of New York. 175 New York Law Journal, No. 24, February 4, 1976, pp. 1, 5; and see the New York Times discussion of the report. Vol. CXXV, No. 43110, February 4, 1976, pp. 1, 25.

(2)

The appellants have failed to give appropriate emphasis to the fact, undisputed, that the New York statutory procedures which they attack *permit the New York Court of Appeals,* even under all the circumstances appellants have stated, *to grant leave to appeal* to any attorney who has been subjected to disciplinary action by the Appellate Division. Although the New York Court of Appeals must exercise this power with a discretion appropriate for the State's highest court, it must be noted that the New York Constitution, Article 6, § 3 circumscribes the jurisdiction of the state Court of Appeals in

all cases, not only in lawyer disciplinary cases. The New York Court of Appeals power to grant leave is equivalent to that given this Court to deny an application for certiorari and to reject an appeal, such as this, for failing to present a *substantial* federal question. The appellants seek to enlarge the "mandatory docket" of the New York Court of Appeals, in a fashion which this Court did not deem suitable to its own "mandatory docket" in *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90 (1974).

Nor have the appellants given any weight to the fact that, in each of their cases, if they had appropriate grounds for doing so, they might have sought direct review by this Court of the action of the New York Court of Appeals in denying any application they had made for leave to appeal (3a, 4a).

Little consideration, too, has been given by the appellants to the fact that only the licenses of lawyers to practice their profession are entrusted to the New York Appellate Divisions. All other professions, for valid reasons, are licensed by the State Department of Education (104a). For appropriate reasons, therefore, based upon the distinctions between the professions, review of professional disciplinary action has been subjected to a different method of review. *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 610 (1935).

CONCLUSION

The appeal should be dismissed in accordance with this Court's decision in *MTM, Inc.* v. *Baxley*, 420 U.S. 799; or the order appealed from should be affirmed.

Dated: New York, New York, February 11, 1976.

Respectfully submitted,

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